UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 13

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 150, AFL-CIO,	)	
And	)	**Case Nos. 13-CP-227526; 13-CC-227527; 13-CC-231597 and 13-CC-233109**
DONEGAL SERVICES, LLC,	)	
And	)	
ROSS BUILDERS, INC.	)	

POST-HEARING BRIEF OF DONEGAL SERVICES, LLC AND ROSS BUILDERS, INC.

The Employers, Donegal Services, LLC ("Donegal") and Ross Builders, Inc. ("Ross Builders") by and through their attorneys, Scott A. Gore and Elliot G. Cole of Laner Muchin, Ltd., hereby files this Post-Hearing Brief.

Scott A. Gore
Laner Muchin, Ltd.
515 N. State Street
Suite 2800
Chicago, Illinois 60654
(312) 467-9800
(312) 467-9479 Fax

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I. PROCEDURAL HISTORY

On September 18, 2018, Donegal Services LLC ("Donegal" or the "Company) filed a charge with the National Labor Relations Board against that International Union of Operating Engineers Local 150 ("Local 150" or the "Union") in case 13-CP-227526 alleging that the Union had engaged, and is engaging, in unfair labor practices within the meaning of Sections 8(b)(1) and 8(b)(7)(C) of the National Labor Relations Act (the "Act"). The Company also filed a charge with the Board against the Union in case 13-CC-225527 alleging that the Union had engaged, and is engaging, in unfair labor practices within the meaning of Section 8(b)(4) of the Act.

The Union entered into a Settlement Agreement with the Region over the above referenced Charges Region then later withdrew the Settlement and later consolidated the matter into the Complaint that is the subject of the instant case.

On November 26, 2018, Donegal filed a charge with the Board against the Union in case 13-CC-231597 alleging that the Union had again, engaged, and is engaging, in unfair labor practices within the meaning of Section 8(b)(4) of the Act.

On December 20, 2018, Ross Builders, Inc. filed a charge with the Board against the Union in case 13-CC-233109 alleging that the Union had engaged, and is engaging, in unfair labor practices within the meaning of Section 8(b)(4) of the Act.

On December 31, 2018, following a field investigation, General Counsel Peter Sung Ohr, on behalf of the Board, issued an Order Furthering Consolidating Cases of the above-referenced charges and a Notice of Hearing pursuant to Section 10(b) of the Act, alleging that the Union had engaged in, and is engaging in, unfair labor practices under Sections 8(b)(4) and 8(b)(7) of the Act.

The hearing in this matter, involving the above-captioned Charges, was held on January 16-17, 22-25, and February 7-8, 2019 at the National Labor Relations Board's Regional Office in Chicago, Illinois, before Administrative Law Judge Kimberly Sorg-Graves, herein ("ALJ"). Post Hearing Briefs in this matter are due on March 22, 2019.

II. FACTS[1]

A. Donegal Services Background and Business Relationships

Donegal specializes in safe and efficient demolition, excavation, portable dumpsters, construction, trucking, fill disposal and hauling services of construction materials in the Chicagoland area and surrounding counties for residential and smaller scale commercial properties. (Tr. 293:3-6.) The Company employs approximately 40 employees, including truck drivers, operators, mechanics, and laborers. (Tr. 292:22-23; 293:1-2; 7-10.) While most employees work from the Companies facility located in Lemont, Illinois, certain drivers initially pick up equipment which is parked at the Willco Green landfill out of convenience, as most of the work the employees perform is hauling construction material for disposal at Willco Green and other landfills.

Simon Bradley ("Bradley") has been the owner of Donegal since approximately 2003. (Tr. 292:15-21.) Local 150 does not have a collective bargaining agreement with International Union of Operating Engineers Local 150 ("Local 150" or the "Union"). (Tr. 294:4-5.)

Donegal contracts with a variety of vendors to perform its business, including companies that it buys stone from, companies and individual persons it performs excavation work for, and companies that it loads and unloads material from. As relevant to the instant case, Donegal contracted with Boughton Materials, Elmhurst-Chicago Stone, WillCo Green, Settler's Hill,

[1] References will be made throughout this Post-Hearing Brief to the transcript (Tr. _____); Employer's Exhibits (CP Ex. _____); General Counsel Exhibits (GC Ex.____); and Union's Exhibits (UN Ex. _____).

Andy's Frozen Custard, Ross Builders,[2] Greenscape Homes, Overstreet Builders, and Provencal Builders (collectively the "Companies") in the greater Chicagoland area in July of 2018. As part of its excavating services, Donegal contracts with quarries such as Boughton Materials and Vulcan Materials to purchase stone and other materials which are used as fill excavated sites for its projects. Donegal also provides construction and clean fill disposal services. The Company disposes of construction material and clean fill by dumping truckloads of materials at companies such as Willco Green, and Settler's Hill. Contaminated fill is sent to landfills that accept contaminated fill, such as Winnebago.

At no time has Local 150 been certified under the Act to be the exclusive collecting bargaining representative of Donegal or Ross Builders. At no material time has Ross Builders been involved in a labor dispute with Local 150. While the Union has brought numerous unfair labor practice charges against Donegal, to date, Donegal has not been found to have violated the Act in any way by any Administrative Law Judge or the Board. In fact, the Union's charges related to the discharge of a former Donegal employee, William Hanahan was withdrawn by the Union on August 22, 2018. Another charge filed on August 21, 2018 alleging 8(a)(1) activity by the Company was dismissed on September 28, 2018 and a charge filed on September 5, 2018 alleging a reduction in the hours of employee Steve O'Gorman because of his union activity have recently been dismissed or withdrawn. With respect to each of these charges, it should be noted that Donegal fully cooperated with the Region, providing witnesses and affidavits in each case.

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[2] Ross Builders is a party to this action as the Company filed an independent charge to the Board (Case No. 13-CC-233109.)

B. Local 150's Organizing Activity Prior to Mid-July, 2018

In August of 2017, Local 150 Vice President Kevin Burke met with Bradley to discuss Bradley and other Donegal 150 employees joining the union. (Tr. 295:3-12; 1-12.) Bradley testified that Burke had said something to the effect of that they "need to get a contract saying now" or else Burke "couldn't protect [Bradley] from other unions." (Tr. 296:15-19.)

In December 2017, Local 150 Director of Organizing Michael Kresge[3] instructed Local 150 task force organizer Ray Sundine to "look into" Donegal Services and WillCo Green. (Tr. 1139:10-13.) The Local 150 task force includes approximately 40 business agents and its duties include organizing, establishing pickets, and truck tailing. (Tr: 1092:24-25; 1093:1-7.) Sundine began trailing Donegal employees and scouting Donegal worksites and shops in Lemont and Plainfield, Illinois, as well as WillCo Green's worksite. (Tr. 1140:1-9.) Sundine communicated with Donegal employees around that time period to "make friends" and, in part, discuss wages and benefits that the employees had at Donegal (Tr. 1140:13-15.)

Beginning in approximately May of 2018, representatives of Local 150 began their organizing campaign of Donegal employees. In approximately late May to early June, Sundine began arriving at Donegal worksites and providing business cards to Donegal employees. (Tr. 298:1-8.) A Donegal employee contacted Bradley, reporting that there "was a guy bothering him" who had been sitting at a worksite all day. (Tr. 298:11-13.) Bradley went to the worksite and told Sundine that he was trespassing and asked him to leave. (Tr. 298:14-15; 299:5-9.)

To effectuate its goals of forcing or requiring Donegal to recognize and bargain with Local 150, Kresge authorized Sundine to procure and compensate at least six "salts" to apply for

[3] Kresge became Vice President of Local 150 on December 18, 2018. (Tr. 1090:22-25.) Kresge's organizing role remained the same as Vice President as it was as Director of Organizing. (Tr. 1092:11-13.)

jobs within Donegal to gather information on the workplace and to solicit favor amongst Donegal employees. (Tr. 1101:14-16; 1142:5-8; GC No. 35.) On or around June 1, 2018, Sundine signed Nick Ross, Mike Munch, and Steve O'Gorman to agreements with Local 150 to act as salts while working for Donegal, for which they received benefits and/or stipends for performing work for the Union. (UN Ex. 14.) Part of these salt Agreements requires that the employees try to organize employees of Donegal and to maintain a record of information for organizing activities.[4] (GC Ex. 35.) Sundine instructed the salts to contact him if any employee of Donegal expressed interest in the Union. (Tr. 1146:12-13.) As a result of these efforts, Sundine met with numerous employees and asked them to sign Union authorization cards. (Tr. 1146:14-17.) Sundine also authorized at least one Donegal employee to seek authorization cards on his behalf, and received three signed authorization cards. (Tr. 1150:19-25.)

C. Local 150 Begins Picketing Donegal and Neutral Companies With Whom Donegal Does Business With

On July 10, 2018, Local 150 filed an unfair labor practice charge against Donegal, alleging that Donegal had wrongfully terminated an employee, William Hanahan in violation of the National Labor Relations Act.[5] Kresge instructed Union agents to truck tail and establish a primary picket at job locations or at supplier customer sites. (Tr. 1116:1-3.) Sundine was placed in charge of the pickets. (Tr. 1116:4-6.) Kresge further instructed Sundine to have retirees establish banners at various sites which were Donegal customers and companies that conducted business with Donegal. (Tr. 1117:14-16.) Those banners were to cast "shame on" a customer or

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[4] Those Agreements are still currently in effect. (Tr. 576: 18-19.)

[5] The NLRB ultimately found that the charge had no merit and the Union withdrew the Charge on August 22, 2018 but continued to picket thereafter. The Company fully cooperated in the investigation of this Charge, providing affidavits to the Region in the investigation of this Charge and those affidavits have been provided to the Union in the Federal Injunction Action which is ancillary to this matter.

companies that did business with Donegal for hiring rat contractors." (Tr. 1118:7-10.) Kresge also instructed Sundine on using the Union's inflatable rats. (Tr. 1118:15-18.) Kresge testified that the rats are accompanied by picket signs "all the time." (Tr. 1133:13-17.)

On July 11, 2018, Sundine and other agents began picketing Donegal's offices in Lemont. (Tr. 1122:12-16; 1156:6-19.) As part of the picketing, business agents trailed Donegal trucks to various job sites and locations. (Tr. 1157:7-14.) Subsequently, Local 150 began setting up banners and inflatable rats at various Donegal locations and at the operations of secondary "neutral" companies that Donegal conducts businesses with. (Tr. 1158:10-25, 1159:1-22.)

Local 150 put its strategies into action at several job sites and company offices, where it set up picket signs, inflatable rats, and banners, including locations that Donegal did not have a presence in and had never worked at. (Tr. 306:13-22.) Local 150 was continuously stationed at Boughton Materials, Settler's Hill, Elmhurst-Chicago Stone, Greenscape Homes, Provencal, Andy's Frozen Custard locations sites (where Donegal never performed work and was not present at any relevant time), Ross Builders (continuously from throughout December and through the date of the hearing) and WillCo Green from July 11 through September, 2018, and on random occasions thereafter, as well as other sites (Tr. 305:14-25; 306:1). On at least one occasion, an inflatable rat was adorned with a sign that read "My name is Simple Simon[.]" (GC No. 33.) Donegal employee Timothy Mix testified that he witnessed inflatable rats and banners being used concurrently with handheld picketing signs. (Tr: 164:7-13.)[6]

In addition to the picket signs, inflatable rats, physical presence, and banners, Local 150 utilized other tactics at the sites. This included, *inter alia*, Union representatives following and "tailgating" employees of Donegal in black vehicles (Tr. 318:5-16; 1157:7-14), shouting

[6] Mix also testified that picketers were present at the Elmhurst-Chicago Stone site both when Donegal was there, and when Donegal was not there. (Tr: 206:11-16.)

profanity at Bradley and Donegal workers (Tr. 307:18-23), blocking worksites of the Companies (Tr. 306:8-12), preventing Donegal from picking up supplies (Tr. 306: 8-12), surrounding Donegal's headquarters with approximately 20 cars (Tr: 300:14-20), and threatening or harassing Donegal (Tr. 294: 2-3).[7]

Bradley testified that Local 150's actions included "stopping people from trying to do their job" and "parking in awkward positions to stop a truck driver from reversing into [a] job site." (Tr. 306: 8-12.) Approximately a few days after Local 150 began picketing, Bradley observed two Local 150 representatives drive two trucks pull into the gate of Boughton Materials. (Tr. 312_0-13.) Bradley saw the Local 150 representatives "run towards the scale house telling [Boughton Materials employees] not to load [Donegal] trucks." (Tr. 312:20-25; 313:1-3.) Similarly, Donegal employee Timothy Mix testified that he had dumped a load of clay material at the Settler's Hill landfill when Local 150 representatives confronted an employee of Settler's Hill, telling him that Mix could not dump at the landfill and that Donegal's truck would have to be reloaded. (Tr. 147:22-25; 147:1-22.) The Settler's Hill employee then wanted to reload the Donegal truck and "detained" Mix for 15 minutes to half an hour. Mix was ultimately told not to come back to the Settler's Hill dump, and testified that he has not returned since. (Tr. 149:7-14.) Donegal field supervisor William Doherty testified that he observed two Union representatives pull cars on top of the spot where Donegal needed to dig. (Tr. 235:1-18.) Doherty asked the Union representatives multiple times to move their pickup truck so that Donegal could begin digging the site, but Union representatives refused to do so. (Tr: 236:17-

[7] The Company attempted to introduce additional evidence of illegal activity by Local 150 with respect to the violation of traffic laws as well as unsafe and intimidating and reckless driving. However, the Union's objection to the presentation of such evidence was sustained. The Company reiterates that this evidence is relevant in that it shows additional coercive action by the Union to support the 8(b)(4) allegations contained in the Complaint.

23.) Bradley also observed "black cars driving around" the Elmhurst-Chicago Stone landfill, following Donegal trucks. (Tr. 318: 5-16, GC Exhibit No. 32.)

Bradley testified that Local 150 representatives spoke to him directly calling ethnic slurs and other "disrespectful stuff." (Tr. 307:18-23.) Wendell Massengill testified that he had been "spit on" and "cut off" after the strike began. (Tr. 1427:14-13.) On approximately six occasions, Local 150 representatives shouted at Bradley to sign a contract with the Union. (Tr. 308:11:20.) Notably, Sundine shouted to Bradley to sign the contract on or around the middle of July while Sundine was stationed by a rat, and Bradley was stopped at a traffic light. (Tr. 308:23-25; 309:1-25.)

D. Local 150 Interferes with the Business of Donegal, Its Customers, and Others It Does Business With

John Boughton, President of the secondary employer Boughton Materials, testified that a Local 150 business agent told Boughton to "stop loading Donegal trucks" since the Union was "going after Donegal." (Tr. 30:7-9.) In response, Boughton told the Union representative that Donegal was an important customer for his business and that Donegal helped "pay [Bougton's] bills." (Tr. 30:10-11.) The following day, without notice, Local 150 erected a 12-foot rat and banners in front of the gate of Boughton Materials with a sign that read "shame on Boughton Materials." (Tr. 30:17-25, 31:6-16; GC Exhibit No. 11, 12.) The rat and banner remained up for eight days, until Boughton Vice President Frank Maly contacted Union 150 to tell them that Boughton was "giving in and [Boughton was] going to stop loading Donegal trucks and that [Local 150] had won." (Tr. 58:1-6.) Within 15 to 30 minutes after the conversation, the rat and

banner were taken down. (Tr. 67:6-14.) Consequently, Boughton ceased loading Donegal from July until the NLRB intervened in September of 2018. (Tr. 64:2-8.)[8]

In approximately August or September, Local 150 representative Tony Deliberto contacted Maly to inform him that "there is gonna be possible picketing activity" since an "ally" of Donegal, RSS Concrete and Excavating, was purchasing stone from Boughton Materials. (GC No. 23A.) In response – and to avoid a second round of picketing by the Union – Maly ceased to load any RSS trucks for jobs involving Donegal. (Tr. 63:7-15.)

Around December of 2018, Bradley spoke to a Local representative named "Big Mo" who was stationed at the office of secondary employer Provencal Construction. (Tr. 324:1-3; 342:13-25; CP Ex. 3-4.) Bradley asked Big Mo for a leaflet. Big Mo said that "he could only give a leaflet to the guys at [Provencal]." (CP Ex. 4.) Big Mo stated that "he was not going to hand [the leaflet] out to the public." (CP Ex. 4.)

On December 17, 2018, Local 150 posted an inflatable rat and a bannered yellow box truck 25 to 30-feet away from the office of Ross Builders.[9] (Tr. 97:21-23.) (GC Exhibit No. 24.) The banner read "shame on Ross Builders." (Tr. 99:1-3.) The rat and banner remained in place through January 16, 2019. (Tr. 101:2.) President-Owner Craig Ross testified that he believed the rat had affected his business. (Tr. 102:14-17.) Ross stated that the rat may make potential customers believe he was "doing something illegal." (Tr. 102:19-25.) Ross further stated that his business had been impacted when UPS stopped delivering to him around early January, 2018. (Tr. 104-1-21.) Ross testified that the website for UPS had a message that it would not deliver to Ross Builders due to a strike, and the only mail he received was a letter from Local 150 that the

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[8] Per Boughton's testimony, the Union had also contacted a customer of Boughton Materials and asked them not to do business with Boughton due to its services to Donegal. (Tr. 36:18-25.)

[9] Again, Donegal has never had a presence at the office of Ross Builders.

Union had permitted to be delivered. *Id*. Bradley, owner of Donegal, also testified that the rats and banners posted at various job sites have affected his business, including losing work with Andy's Frozen Custard. (Tr. 330:1-11.)

E. Local 150 Continues Picketing Donegal and Continues Its Attempts to Organize the Company

During the picketing from July to September,[10] Sundine stayed in contact with the salts at Donegal over the phone, by text message, and through in-person meetings. (Tr. 1179:16-25, 1180:1.) On August 5, 2018, salt Mike Munch reported to Sundine via text message that he had breakfast with a Donegal employee. During that breakfast, Munch and the employee discussed joining Local 150, and the employee thought that Local 150 looked "pretty good." (GC 36, F1OL01052.) On August 12, 2018, Munch texted Sundine that Donegal "is losing money every day" that the Local is out there" and that "there is still a war to be fought [against Donegal]." Sundine responded that they have "a few more cards to play if we have to" in order to "get there." (CP Ex. 14, D1OL01050.) On October 10, 2018, Munch texted Sundine and recounted how he distributed stickers to fellow employees while wearing a Local 150 shirt. (CP Ex. 14, D1OL01208.) Mix testified that he saw salt Steve O'Gorman passing out materials at the WillCo worksite. (Tr. 200:16-23.)

On August 25, 2018, salt Nick Ross texted Sundine to let him know that another employee had begun wearing Local 150 stickers on his hard hat, to which Sundine replied "Cool. He's playing[.]" (GC 37 at D1OL01167.) On August 27, 2018, Ross informed Sundine that he had begun wearing Local 150 shirts in the workplace. (GC 37 at D1Ol01168.) On August 28, 2018, Ross texted Sundine on the status of health insurance and employment benefits and the

[10] The Labor Board directed the Union to take down the pickets as of September 26, 2018. (Tr. 1208:13-17; 1213:24-25; 1214:1-4.)

401(k)s of Donegal employees. (GC 37, D1OL01170.) On September 6, 2018, Sundine told Ross that he would give Ross's phone number to other Donegal employees so that he "can say the things [the Union] can't" such as discussion of pay and benefits. (GC 37, D1OL01175.) On September 13, 2018, Ross told Sundine that he "keep[s] pestering" Donegal about health insurance. (CP Ex. 14, D1OL01070.) On September 26, 2018, Ross texted Sundine that he hopes "they figure out the contract soon." (CP Ex., D1OL01071.) Munch updated Sundine on a daily or weekly basis as to his progress in getting a feel for how Donegal employees felt about the Union. (Tr. 683:1-7.) For example, Munch testified that he had spoken to a Donegal employee about Local 150 after July about the "union stuff" that was going on and later reported to Sundine that "the union would be appreciated at the shop." (Tr. 671:15-20; 673:13-24; 674:3-5; 675:18-25, 676:1-12.) Munch also testified that he had texted Sundine about Donegal employees and their "complaints about working conditions" on October 31, 2018. (Tr. 689:3-10.) Munch testified that Ray had directly asked Munch via text to ask the employee about the Union. (Tr. 690:13-19.) After Sundine's instruction, Munch asked the employee about the union, and the employee responded, "that would be fucking amazing." (Tr. 689:16-19.)

At no point did Sundine reply to any of the salts to stop organizing and to stop referring individuals to Sundine. (Tr. 1188:2-10.) Instead, Sundine just "let it go on" and "[d]idn't say anything" to prevent the salts' ongoing attempts to solicit interest from and recruit employees to the Union (Tr. 1188:24, 1189:2-7.) On at least one occasion, October 31, 2018, Sundine directly instructed Munch to ask an employee about his interest in the Union. (Tr. 690:8-19.)

Wendell Masengill, a former employee of Donegal, recalled Local 150 soliciting him in the summer of 2018 to join the Union and asking him if he would sign an authorization card so that he could help "bring the other guys in." (Tr. 1421:5-13, 1426:15-24.) The Union's efforts

to involve Masengill occurred after the strikes began. (Tr. 1427:5-13.) Mix testified that two agents, including Sundine, had contacted him in early or mid-July about signing an authorization card on the premises of Elmhurst-Chicago Stone. (Tr. 204:14-24.) Mix also testified that in August of 2018 Local 150 Union salt Steven O'Gorman contacted Mix to say that if Mix signed a Union authorization card, Mix would be able to get into the Union's apprenticeship program. (Tr. 199:17-25.) Doherty testified that in August or September Local 150 representatives told him that Simon Bradley should sign the contract and that Doherty's family could sign up with Local 150 as well. (Tr. 244:12-22.)

F. Joint Employer Issues Raised by the Union

As part of its defense against the actions, Local 150 alleges that Donegal, WillCo Green, and/or SJZJ are joint employers. Therefore, the Company presents the facts herein.

Donegal and WillCo Green are two separate companies and operate separately. (Tr. 1385:14-16.) The businesses are different. SJZJ manages the operations of a landfill and recyclery which entails the operations of heavy equipment and sorting of recyclable materials, while Donegal, for the most part operates a fleet of trucks. Major business decisions for Donegal are made entirely by its owner, Simon Bradley. (Tr. 493:14-16.) All major decisions for SJZJ – the entity formed by Bradley to manage the operations of WillCo - are made by James Barry. (Tr. 493:17-19.) The interactions between Bradley and Barry are "very small" and Bradley spends "99 percent" of his time elsewhere. (Tr. 509:2-10.)

Bradley, Donegal dispatcher Timothy Mix, and Donegal's shop mechanic have the exclusive authority to hire or fire Donegal employees. (Tr. 506:7-12.) Barry does not "have the authority to hire" Donegal employees, including Donegal drivers at the WillCo site, and has not done so. (Tr. 1351:23-25, 1352:1-8.) Similarly, Barry "has no authority to fire" Donegal employees and has never done so, even Donegal drivers at the WillCo worksite. (Tr. 1353:12-

15.) Barry is in charge of hiring the employees of SJZJ. (Tr. 493:20-22.) Barry also conducts the firing of SJZJ employees, and Bradley has never fired any employee of SJZJ. (Tr. 484:1-2.)

Except for Barry who receives payment from both Donegal and SJZJ, employment status is also not shared between the entities. Employees may work for either Donegal or SJZJ, but not both. Employees that previously worked with one entity and subsequently work for the other must terminate their employment from the prior entity. (Tr. 1374: 16-24.) Donegal maintains a different, more detailed application related to DOT regulations and the holding of a Commercial Driver's license which is not a requirement for SJZJ employees. If an employee of one entity leaves for the other, they are treated as a new employee, with no credit served. (Tr. 1368:21-25, 1369:1-5.) If a Donegal applicant mistakenly gives an application to SJZJ, it is sent to Donegal, because SJZJ does not hire Donegal employees. (Tr. 1376:1-10.) SJZJ management has no role in assessing the skills or abilities of Donegal applicants. (Tr. 1376: 10-22.) Bradley has no right to tell Barry to transition employees between the entities, and has never done so. (Tr. 531:14-19.) The entities maintain separate personnel files, and the entities do not have access to each other's personnel files. (Tr. 1374: 10-12; 1385: 5-7.)

The employees of the two entities do not share compensation rates nor do they have shared benefit plans. SJZJ Green management sets the hourly rate for SJZJ Green employees, and does not consult with Donegal. (Tr. 1342:16-25.) Barry sets the wages of employees and determines the hourly rate without any consultation with Bradley. (Tr. 1342:14-25.) Even upon the creation of SJZJ, Bradley was not part of setting the wage rates for SJZJ employees at any point. (Tr. 518:18-20.) Bradley only sets the wage rates for Donegal, and Barry has no role in setting the wage rates for Donegal employees. (Tr. 1358:13-16.) Donegal and SJZJ also have different benefits under different policies. (Tr. 1362: 7:20.) Bradley does not have any say in

Barry's decision on the benefit plan of SJZJ. (Tr. 479: 4-8.) Additionally, the companies have different payrolls as well as different banking institutions. (Tr. 398:2-8.) In fact, SJZJ was established as the payroll entity for the employees located at WillCo Green separately from Donegal. (Tr. 1234:18-22.)

Neither SJZJ or WillCo Green does not "get involved in management" of Donegal employees. (Tr. 1282:16-18.) This includes, for example, informing employees of when they can or cannot take a lunch break. (Tr. 1286:17-22.) Further, Barry has no role in disciplining employees for ineffective performance, such as taking too long to drop a load. (Tr. 1360:24-25, 1361:1.) Employees do not attend any common training sessions and Donegal does not maintain a work office on WillCo Green property, or vice versa.

Donegal dispatches "roll-offs" and dump trucks to and from the WillCo Green property. The dispatching of Donegal trucks is entirely done through Donegal by its dispatcher Timothy Mix. At most, Barry can request additional drivers when needed for WillCo Green operations, but Barry may not direct the work of those drivers or tell them what their functions are. (Tr. 550: 8-23.) Instead, the "ultimate call as to what drivers are assigned" to pick up or drop off materials is made from Donegal dispatchers, not Willco Green. (Tr. 1267:16-19.) Once Donegal Truck drivers leave the Willco site to pick up or drop off loads, they are "Donegal's responsibility." (Tr. 1282: 4-5.) Donegal drivers sometimes "have nothing to do with WillCo during the course of the day." (Tr. 1279: 13-15.)

III. APPLICABLE LAW

A. Section 8(b)(7)

Section 8(b)(7), makes it unlawful for a labor organization or its agents "to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as

the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees…where such picketing has been conducted without a petition under Section 9(c) being filed ***within a reasonable period of time not to exceed 30 days*** from the commencement of such picketing[.]" (emphasis added.)

Section 8(b)(7)(c) protects employers and employees from the detrimental effects of prolonged picketing. The restriction is meant to encourage the use of the Board's election mechanism rather than extend picketing to resolve the question of representation. *NVE Constructors Inc. v. NLRB*, 934 F.2d 1084, 137 LRRM 2604 (9th Cir. 1991). Once the picketing has occurred for more than a reasonable time, "any additional picketing or picketing threats will violate § 8(b)(7)(C)." *Mine Workers*, 302 N.L.R.B. 441, 137 LRRM 1001 (1991). The NLRB will not tolerate a union's attempt to circumvent § 8(b)(7)(C) by merely saying it is "truthfully advising the public." *Phila. Window Cleaners & Maint. Workers' Union*, 136 N.L.R.B. 1104, 49 LRRM 1939 (1962). Persons maintaining a presence at the employer's workplace are picketing under Section 8(b)(7)(C) where "the relationship of such persons to the strike is clear." *NLRB, Board Decision, In re Intl. Union, United Mine Workers of America*, 298 N.L.R.B. 910, 134 LRRM 1215 (1990).

B. Section 8(b)(4)

Section 8(b)(4)(i) of the Act makes it unlawful for a labor organization or its agents "(i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services[.]"

Section 8(b)(4)(ii) specifically establishes that it is an unfair labor practice for a union or its agents to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce." The Act specifies that the intention of Section 8(b)(4) is to prevent secondary boycotting "where . . . an object thereof is forcing or requiring any person to . . . cease doing business with any other person[.]" Section 8(b)(4)(ii)(B).

Otherwise stated, a union violates Section 8(b)(4)(B) "if any object of [its coercive activity] is to exert improper influence on secondary or neutral parties." *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 689 (1951). Further, the language of Section 8(b)(4)(ii)(B) includes not only acts of compelling or restraining nature, but also "other economic retaliation or pressure in the background of a labor dispute." *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 fn. 2 (1992) (internal quotations immitted).

Section 8(b)(4) was passed with the objective of "shielding unoffending employers" from pressure in controversies not their own." *See Denver Building Trades Council*, 341 U.S. at 692. It was instituted to "make [secondary boycotts] an unfair labor practice." 2 Leg. History Labor Management Relations Act of 1947 (LMRA) 1106 (Cong. Rec. 4323). It further protects neutral employers, employees, and customers from "coerced participation in industrial strife." *NLRB v. Retail Clerks Local 1001 (Safeco)*, 447 U.S. 607, 617-618 (1980). "Congress intended its prohibition to reach broadly." *Longshoremen ILA v. Allied International Inc.*, 456 U.S. 212, 225 (1982). "Accordingly, as the agency charged with enforcing the Act, the Board must ensure neutral parties receive the broad protection Congress intended they should have from pressures in controversies not their own." *International Brotherhood of Electrical Workers, Local Union 357, AFL-CIO and Desert Sun Enterprises Limited d.b.a. Convention Technical Services*, 2018

NLRB LEXIS 663, 367 NLRB No. 61 (Dec. 27, 2018) (internal quotations and citations omitted). While unions' have a right to exert legitimate pressure on employers with whom they have a primary labor dispute, Section 8(b)(4) was intended to shield neutral businesses from labor disputes not their own. *NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.)*, 400 U.S. 297, 302-303 (1971); *see also NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1951).

The NLRB has defined the "coercion" element as "nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation and pressure in the background of a labor dispute." *See Carpenters Kentucky State Dis. Council (Wehr Constr., Inc.)*, 308 NLRB 1129, 1130 n.2 (1992). The Supreme Court has held that "the prohibition of § 8 (b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 68 (1964). Further, coercion under section 8(b)(4)(ii) is an elastic concept. *See Pye v. Teamsters Local Union No. 122*, 61 F.3d 1013, 1024 (1st Cir. 1995) (wide variety of activity falls within conceptual ambit of section 8(b)(4)(ii)).

IV. ARGUMENT

A. Local 150 Violated Section 8(b)(7) by Engaging in Unlawful Recognitional Picketing Beyond 30 Days

The Union illegally picketed for recognition for a time period lasting more than 30 days in violation of Section 8(b)(7) of the Act. The Union began picketing on July 11, 2018, under the pretense that the termination of a former Donegal employee, Bill Hanahan, was an unfair

labor practice.[11] However, the Union's unmistakable and continual efforts to pursue recognition both before, during, and after the Union's picketing demonstrates that the unmerited unfair labor charge filed by the Union on July 10, 2019 was, at best, anecdotal.

At all relevant times, the Union had a significant interest in unionizing Donegal. Only five weeks before the unfair labor practice charge, Local 150 placed numerous salts in Donegal's workforce. For months after the beginning of the picket, and well after July 10, 2018, Sundine continued dialogue with the salts as they made continual efforts to promote the Union and solicit interest. Most tellingly, Sundine told salt Nick Ross that he would give Ross's phone number to other Donegal employees so that Ross could "can say the things [the Union] can't." (GC 37, D1OL01175.) Sundine's efforts to circumvent the law by using Ross as a messenger are transparent evidence of the Union's ongoing attempts towards recognition. Similarly, on October 31, 2018, Sundine directly instructed salt Mike Munch to ask an employee about his interest in the Union. (Tr. 690:13-19.)

Further, Sundine continually failed to instruct the salts to stop pursuing unionization even though they continued their efforts to organize the company:

- On August 5, 2018, salt Munch reported via text message that he had a discussion over breakfast with a Donegal employee about joining Local 150. Sundine did not write back to Munch that the Union was not pursuing recognition, or that Munch should cease any solicitation on behalf of the Union. (GC 36, F1OL01052.)

- On August 12, 2018, Munch texted Sundine that Donegal "is losing money every day" that the Local is picketing and that "there is still a war to be fought[.]" Sundine did not inform Munch that the Union was not currently seeking

[11] The Administrative Law Judge did not allow the facts on the unfair labor practice charge to be admitted, but these are relevant in that the facts surrounding the discharge of Bill Hanahan did not in any way support the charges, and were merely a pretextual excuse to continue picketing. Immediately after the charge was withdrawn, the Union filed another unfair labor practice charge alleging violations of Section 8(a)(1) by the Employer which were ultimately dismissed. This charge was yet another attempt to extend the picketing by the Union.

recognition, but instead wrote that they have "a few more cards to play if we have to" in order to "get there." (CP Ex. 14, D1OL01050.)

- On August 25, 2018, Ross reported to Sundine that another employee had begun wearing Local 150 stickers at work. Rather than informing Ross that they were not trying to develop interest in the Union, Sundine instead expressed approval. (GC Ex. 37 at D1OL01167.)

- On August 27, 2018, Ross informed Sundine that he had begun wearing Local 150 shirts in the workplace. Sundine again failed to point out that the promotion of the Union was not the goal of the picketing. (GC Ex. 37 at D1Ol01168.)

- On August 28, 2018, Ross texted Sundine on the status of health insurance and employment benefits and the 401(k)s of Donegal employees. (GC Ex. 37, D1OL01170.) Again, Sundine made no effort to inform Ross that they had ceased the recognition campaign.

- On September 13, 2018, Ross told Sundine that he "keep[s] pestering" Donegal about health insurance. (CP Ex. 14, D1OL01070.) Sundine made no effort to inform Ross that the Union was not pursuing such information at that time.

- On September 26, 2018, Ross texted Sundine that he hopes "they figure out the contract soon." (CP Ex. 14, D1OL01071.) Sundine failed to inform Ross that there were no negotiations taking place, and that Local 150 was not campaigning.

- On October 10, 2018, Munch texted Sundine to recount how he distributed stickers to fellow employees while wearing a Local 150 shirt. (CP Ex. 14, D1OL01208.) Sundine made no effort to inform Munch that the Union's efforts were not to solicit interest in the Union.

All of these communications show that Sundine enabled the salts to continue the recognition campaign by soliciting membership, promoting the Union through stickers and T-shirts, and gathering information on Donegal's benefits for the Unions appraisal. Sundine admittedly "let [the salts' actions] go on" and "[d]idn't say anything" to stop the salts' attempts to foster interest in the Union. (Tr. 1188:24, 1189:2-7.) Notably, the Union introduced no written record of Sundine – or any other Local 150 representative – instructing Donegal salts to stop organizing after July 11, 2018, despite almost daily interaction with business agents,

representatives, or salts. Additionally, testimony on the record by Union salts Ross and Munch entirely lack credibility, as more fully explained below.[12]

Instead, Local 150 representatives and salts continued to attempt to organize Donegal. For example, Masengill was asked to sign a card and "bring the other guys in." (Tr. 1421:5-13, 1426:15-24.) Mix testified that two agents "basically said that if [Mix] was willing to sign a card" he would get into a Union apprenticeship program. (Tr. 199: 22-25.) Mix also testified Sundine had later asked him to "sign a card." (Tr. 204:19:20.) Doherty testified that in August or September Local 150 representatives told him that "Simon should sign" and that it would be "better for" Doherty if Simon signed. (Tr. 244:12-16.) Additionally, Doherty further testified that the Union said that he "could take [his] brother and [his] family [to] sign up too[.]"[13] (Tr. 244:16-17.)

Even assuming, *arguendo*, that the Union had non-pretextual grounds, that does not erase that the Union had at least *some* goal of seeking recognition. The longstanding principle is that "even if there are legitimate purposes for picketing by a union, the prescriptions of 8(b)(7) apply **if one of** the union objects is recognitional. *Stage Employees IATSI Local 15 (Albatross Productions)*, 275 NLRB 744-745 (1985) (emphasis added); *see also St. Helens Shop N'Kart*, 311 NLRB No. 180 1280, 1286 (1993.) Where a union's actions "had at least a partially recognitional objective" in unionizing, there has been a violation of Section 8(b)(7)(c*). Plumbers Local 32 (Robert E. Bayley Construction)*, 315 NLRB No. 115m 791 (1994) (finding that the union switch from recognitional picketing to unfair labor picketing was an apparent attempt to avoid the prohibition of 8(b)(7)(c).).

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[12] *See infra.* Section V Credibility.

[13] Doherty's family also works in the construction industry. (Tr. 244:23-25.)

That precedent is applicable here. Even if Local 150 had *some* earnest goal in legally picketing an alleged unlawful practice, the aim of unionizing Donegal was nonetheless still "a" goal of Local 150. Along with Sundine's direct efforts to have Ross organize for the Union, two current and one former employee of Donegal testified to have been approached by Local 150 representatives about joining the Union after the initiation of the July 11 picket. Masengill, Mix, and Doherty all testified to the various ways that they were solicited by Local 150 representatives after the picketing began. Those actions are bolstered by the admissions by the admission of Munch that he had spoken to an employee about joining the Union at Sundine's instruction as recently as October 31, 2018.

At hearing, the Union attempts to portray its ongoing unionization efforts as entirely separate from picketing towards its failed unfair labor practice charge. Those efforts are, at best, implausible. Had the Union made a good-faith, lawful picket, it would have *some* type of tangible evidence to show that it had ceased organizing altogether. Instead, a substantial amount of evidence on record demonstrates ongoing campaign actions towards Donegal during what was characterized as an unfair labor practice strike. The Union's actions in its organizational efforts beyond 30 days are accordingly in violation of Section 8(b)(7).

B. The Union's Use of Bannering and Inflatable Rats Threatened, Coerced, or Restrained the Secondary Neutral Employers in Violation of Section 8(b)(4)

Until recently, the underlying intent of Section 8(b)(4) was clear – secondary employers who were not participants in the labor dispute should be protected from undue influence. A quagmire of decisions has complicated the intentions of Section 8(b)(4) and steered away from focusing on "the end sought" by such activities and instead given more significance to "the means used."[14]

[14] *Electrical Workers Local 401 v. NLRB (Samuel Langer)*, 341 U.S. 694, 701-702 (1951).

In 2011, the Board determined in a split decision that a union had not violated Section 8(b)(4) by stationing an inflatable rat outside a primary hospital. *Sheet Metal Workers Local 15*, 356 NLRB No. 162 (2011). That decision mostly confirmed the narrow interpretations of the NLRA in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (2010). In *Sheet Metal Workers*, the majority members of the Board determined that the union did not violate the Act because the rat did not involve confrontational conduct sufficient to be considered picketing and did not qualify as non-picketing conduct that was otherwise lawfully coercive.

Charging Party contends that, to the extent they are applicable here, the Board's prior holdings and were decided incorrectly. Section 8(b)(4) is designed to prevent actions that "threaten, coerce, or restrain." The statute encompasses virtually "***any*** form of economic pressure of a compelling or restraining nature*."* *Associated General Contractors of California v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975); *Local Union No. 25, A/W Int'l Bhd. of Teamsters, etc. v. NLRB*, 831 F.2d 1149, 1153 (1st Cir. 1987) (emphasis added). Here, the means used cannot be used to justify the end goal: forcing "any form" of economic pressure on the worksites of secondary employers who are not a party to the labor dispute.

As the evidence presented at the hearing demonstrates, the Union's use of banners and inflatable rats served to threaten, coerce, or restrain the neutral companies. The Union's intentions plainly run afoul of Section 8(b)(4), in that the picketing is aimed to force or require any person to cease doing business with Donegal. The Union coordinated multi-site intimidation tactics, including bannering and the placement of inflatable rats at the worksites of secondary neutral employers. The intent of the union's bannering and use of inflatable rats was to threaten the business relationship between the primary employer and the secondary employer by subjecting the secondary employer to the threat of economic harm, lasting reputational harm,

undue pressure, and intimidation. These actions run afoul of both the intentions and the plain meaning of Section 8(4)(b).

1. *The Union's Tactics Constitute Unlawful Signal Picketing*

The Union's use of inflatable rats and bannering constitute a "signal" to customers and employees that by simply arriving at the workplace, they are crossing an invisible line between the business and the Union. *See Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 fn. 2 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990) (union agents stationed around a sign "constitue[d] a 'signal' to the employees of secondary and neutral employers" to not pass through an entry gate). Historically, signal picketing exists when the stationing of union representatives, signs, or both act as a signal to others to induce action.[15] The Board has recognized that – even where the union activity is not "traditional" picketing – a union's actions may still constitute a signal to the neutral employees.[16] The number of employees stationed by the banner is not dispositive.[17] Accordingly, the amount of employees milling about is not determinative in whether the actions constitute signal picketing. Rather, what matters is whether the goal of the actions is aimed to induce a response, rather than just communicating an idea.

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[15] *See Teamsters Local Union 688 (Levitz Furniture Co.)*, 205 N.L.R.B. 1131, 1133 (1973) (finding signal picketing on the basis of union agents' regular presence at the entrance of an employer's parking lot).

[16] *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB 426, 437-38, 437 (1995), *affirmed in relevant part*, 154 F.3d 137 (3d Cir. 1998) (holding that an employee wearing a rat costume "create[d] an impression" of an unfair job.)

[17] *See, e.g., Teamsters Local 688 (Levitz Furniture)*, 205 N.L.R.B. at 1132 (assessing activity by only two persons).

Here, the bannering and inflatable rats do not simply communicate an idea. Instead, they serve as a message.[18] The underlying usage of inflatable rats is an unmistakable assertion of confrontational intimidation and coercion. As previously argued by NLRB General Counsel, "[t]he union's use of an inflatable rat, a well-known symbol of labor unrest, is tantamount to picketing." *Sheet Metal Workers International Association, Local 15*, 12-CC-1258, 2003 NLRB GCM LEXIS 62 (April 4, 2003); General Counsel's post-hearing brief p. 10. Board Member Hayes, echoing the argument of the NLRB General Counsel, stated that the display of widely-recognized union rats creates, in essence, "an invisible picket line that should not be crossed." *Sheet Metal Workers Local 15*, 356 NLRB No. 162. The point of this "invisible line" is to exert the same purpose of a picket – "to intimidate by conduct, not to persuade by communication." *Id.* This message is "unmistakably confrontational and coercive[.]" *Id*. Simply put, the entire point of the rat is to "create the impression that this was an unfair job, and that the Union was requesting neutral [parties] not to enter the site."[19] Otherwise stated, banners and rats are inherently confrontational, in that they are a widely recognized tool to induce an action through intimidation. Secondary employers are urged to make a decision on which side of the labor strife they are on, not just to take away some sort of constitutional, ideological impression. When placed in a position to make a determination on how to best preserve its business and how to save itself from economic or reputational harm, secondary employers have been coerced and intimidated into making a decision that may be adverse to their operations.

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[18] Donegal contends that the picketing done by the Union is unlawful. Therefore, any constitutional First Amendment concerns are not at issue. The National Labor Relations Act curtails speech that would normally be protected when it is prohibited under the Act. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades* Council, 485 U.S. at 579-80 (1988).

[19] *Southwest Regional Council of Carpenters (New Star General Contractors, Inc.)*, 356 NLRB No. 88 (2011).

2. *No "Additional" Activities Were Necessary to Coerce or Threaten Secondary Employers Through Stationary Banners and Rats*

The Board maintains a long-standing precedent holding that a variety of activities fall within the scope of picketing.[20] In particular, the Board has held that an assortment of stationary activities can constitute coercive union activity under Section 8(b)(4). *See, e.g., Teamsters Local 182 (Woodward Motors)*, 135 NLRB 851 fn. 1, 857 (1962) (holding that the act of placing stationary picket signs in a snowbank abutting an employer's premises constituted picketing); *Calcon Construction*, 287 NLRB 570, 572-574 (1987) (where picket signs laid on the ground "at or near" jobsite entrances were designed to induce secondary employees to withhold labor); *Mine Workers Local 1329 (Alpine Construction)*, 276 NLRB 415, 431 (1985), remanded on other grounds 812 F.2d 741 (D.C. Cir. 1987) (finding signs on safety cones, barricades, fence posts, and pickup trucks as violative.)[21]

In each of these cases, the Board found the act of posting stationary signage demonstrated unlawful picketing of the neutral employer. Even recently, the Board has acknowledged that multiple prior decisions found there to be picketing through signage, even when there was no "patrolling or other ambulation."[22] However, the Board has steered away from that precedent, distinguishing those decisions as involving some type of "additional evidence of the union's effort to induce or encourage a work stoppage or refusal to handle goods or perform services."[23]

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[20] *See Eliason & Knuth*, 355 NLRB at 815 (Members Schaumber and Hayes, dissenting). In support of a broad, flexible view of picketing, the Supreme Court has gone so far as to find that "standing" in an area "generally adjacent to someone else's premises" fell within the purview of picketing under Section 8(b)(4). *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 76 (1964). (Black, J., concurring)

[21] *See also Constr. & Gen. Laborers Union, Local 304 (Athejen Corp.)*, 260 N.L.R.B. 1311, 1319 (1982).

[22] *Carpenters Local 1506 (Eliason & Knuth of Arizona)* at 804 (distinguishing stationary signage from stationary signage that was preceded or accompanied by other forms of picketing).

[23] *Carpenters Local 1506 (Eliason & Knuth of Arizona)* at 805 fn. 28.

This "additional evidence" is a constantly evolving term, however, it is clear that the instant actions of the Union required no patrolling, ambulatory activities, or other such activities to coerce or threaten the secondary employers of Donegal.

The effect of the stationary banners and rats is clear. As stated by the owner of Ross Builders, the rats and banners gave the impression to customers or employees that the employer is "doing something illegal." (Tr. 102: 19-25.) Bradley further testified that he had lost business with Andy's Frozen Custard. (Tr. 330:1-11.) Further, Boughton Material Vice President Maly testified that the rats "hurt [Boughton's] reputation[.]" (Tr: 66:4-14.) The Vice President of Boughton Materials, Maly, testified that the rat and accompanying banner was one of the ways that Local 150 had "communicated" to him that he should not continue his operations with the primary employer. (Tr. 70:6-11.) The coercion from the rats and banners directly caused Boughton Materials to stop doing business with Donegal. Within eight days, Maly told Local 150 that it had "won" and that Boughton would stop loading Donegal trucks. (Tr. 58:1-6.) The moment that Maly acquiesced, the rats and banners were removed.

The rat and the adjacent banner casting shame on Boughton Materials was sufficient to shut down secondary employer's operations with Donegal – not out of "shame," but out of fear, exactly what Section 8(b)(4) is designed to prevent. *See Denver Building Trades Council*, 341 U.S. at 692. The presence of undefined "additional" activities is not dispositive. Inherently, the rats and banners intended and succeeded in coercing and threatening the secondary employers in violation Section 8(b)(4), as readily apparent here.

3. *The Union's Use of Bannering and Inflatable Rats Cannot Be Seen in a Vacuum.*

The NLRB has defined the "coercion" element as "nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or

other economic retaliation and pressure in the background of a labor dispute." *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 fn. 2 (1992) (internal quotations omitted) (emphasis added).

The use of rats and banners does not exist in a bubble. Instead, they exist in the background of an ongoing labor dispute, fostering the economic retaliation and pressure on the secondary employers. Here, the bannering and use of inflatable rats cannot be removed from the greater context. The incidents between the Union and the secondary employers inform the threatening and coercive nature of the banners and rats.

As shown by the evidence presented, Union officials confronted secondary employees at the Boughton Materials worksite and directed secondary employers to not perform work with Donegal. (Tr. 312:20-25; 313:1-3.)[24] Similarly, Local 150 representatives confronted secondary employees of Settler's Hill, directing Donegal employees to not perform work at the landfill. (Tr. 147:22-25; 147:1-22.) The Union also obstructed Donegal employees from excavating at a secondary employer's worksite (Tr. 235:1-18.) Union representatives stationed themselves around worksites of secondary employers, targeting them, and not the public, with literature. (CP Ex. 4.)

Employees at Boughton Materials were "extremely nervous" about loading trucks. (Tr. 66:4-14.) As the evidence demonstrates, the actions of the Union are conduct that constitutes picketing under the Act, regardless of varying standards of past Board decisions. The Union "trailed" Donegal trucks wherever they went, including onto the property of secondary employers. The record even suggested that Local representatives had contacted other companies

[24] Notably, Boughton Materials already has Local 150 employees.

to not do business with Boughton Materials. (Tr. 70:6-11.)[25] In this context, the rats and banners are not innocuous messages – they are plainly "other economic retaliation and pressure in the background of a labor dispute." *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB at 1130 fn. 2.

Undoubtably, the Union created an environment wherein the secondary employers had to worry on a daily basis whether they would be pulled into the fray. The rats and banners, often accompanied by numerous dark vehicles seen trailing each Donegal truck, served as a constant reminder of the ongoing "watch" by the Union.[26] For secondary employers that had already been impacted by the Union's illegal activities, the rats and banners were a direct threat of further actions by the Union. For employees that had been actively solicited by agents of the Union and/or salts, the rats and banners created additional pressure on the employee to join the Union's efforts. Accordingly, the rats and banners are part of a greater background of the Union's efforts, which included myriad illegal activities, including trespassing, threats, active solicitation and campaigning, unfair labor practice charges, and illegal instructions to secondary employees.

C. Donegal Services, LLC and Willco Green are Not Joint Employers

The Company and Willco Green are not joint employers, and thus are not bound to each other's responsibilities under the National Labor Relations Act. Under the Act, there has been a longstanding consensus regarding the general formulation of the Board's joint-employer standard: Two employers are a joint employer if they share or codetermine those matters

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[25] The Employer respects the Administrative Law Judge's determination that additional testimony on the issue should be limited. Donegal contends that, should such evidence be permissible, it would demonstrate that two employees contacted Boughton Materials management about the Union's contacts with the company's customers.

[26] Again, the Company attempted to introduce additional evidence of the coercive and illegal activity of Local 150 agents as they tailed the Donegal drivers. Had the Company been allowed to introduce this evidence, it would have supported its 8(b)(4) as well as 8(b)(7) allegations.

governing the employees' essential terms and conditions of employment. *See CNN America, Inc.,* 361 NLRB 439, 441, 469 (2014), enfd. denied in part 865 F.3d 740 (D.C. Cir. 2017); *Southern California Gas Co.,* 302 NLRB 456, 461 (1991). The general formulation derives from language in *Greyhound Corp.,* 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 778 (1966), and was endorsed in *NLRB* v. *Browning-Ferris Industries,* 691 F.2d 1117, 1122-1123 (3d Cir. 1982), where the United States Court of Appeals for the Third Circuit carefully explained the differences between the Board's joint-employer and single-employer doctrines, which had sometimes been confused.

On September 14, 2018, the NLRB issued a proposed rule with respect to the definition of a "Joint Employer" to remedy recent adjudicatory volatility. In the rule, the Board has proposed the following: an employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a **joint employer** of a separate employer's employees **only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment in a manner that is not limited and routine.**[27] 83 FR 46681 (Sept. 14, 2018).

The NLRB's proposed rule would align the Board with the precedent it has previously established *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017). Under that standard, to be joint employers, one employer while contracting in good faith with an independent company must have retained for itself "sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." *Hy-Brand*, 365

[27] A petition for review is pending in the United States Court of Appeals for the District of Columbia Circuit.

NLRB No. 156, slip op. at 6 (citing *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982)). Further, the business entities involved "share or co-determine those matters governing the essential terms and conditions of employment." *Id*. The Board has stated it would focus on whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Id.* (internal citations omitted).

The Board has described that an "essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate." *Id*. (citing *Airborne Express*, 338 NLRB 597, fn. 1 (2002)). Further, a contractor will, out of necessity, "exercise sufficient control over the operations of a contractor at its facility so that it will be in a position to take action to prevent disruption of…operations or to see that it is obtaining the services contracted for." *Southern California Gas*, 302 NLRB 456, 461 (1991). As such, "the existence of such control is not, in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees." *Id*.

The Board has held that "limited and routine" supervision and direction of an employers' employees does not suffice to establish joint-employer status. *Hy-Brand*, slip op. at 6 (citing *Laerco*, 269 NLRB 324, 326 (1984)). This "limited and routine" standard is found when "a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work." *Id.* (The Board's current proposed rule echoes this same "limited and routine" standard.)

As stated herein, the employer-contractor relationship between Willco Green and Donegal does not meet the Board's interpretation of "joint employer" under its prior precedent or the current proposed rulemaking supporting those standards.

1. *Donegal and Willco Green Do Not Share or Co-Determine Matters Governing the Essential Terms and Conditions of Employment*

In *Hy-brand*, to determine "direct and immediate impact" on the employees of two contracted entities, the Board considered whether two entities shared corporate officials, whether the corporate official had hiring and firing control over the workers of both entities, whether employees participated in the same 401(k), health benefit, and compensation plans, and whether the employees attended common training sessions, meetings, and worked under the same employment policies. Additionally, under the proposed rule, the Board will find two entities when the "direct and immediate" control shared between the parties includes essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.

Those conditions are absent here. Donegal and Willco do not, and have not, governed the essential terms of employment of each other's employees. For starters, the parties exercise completely independent authority with respect to administering, facilitating, or controlling the hiring or firing of any employee. (Tr. 506:7-12.) As the record demonstrates, Bradley oversees the day-to-day and the large-scale functions of Donegal, including hiring and firing. Similarly, Barry oversees the day-to-day and large-scale functions of WillCo Green, including hiring and firing. The companies possess different payrolls, accounts, personnel practices, employees, and employee wages and benefits. As such, the two entities do not have a direct and immediate impact on each other's employment matters.

2. *Any Direction or Control is Limited and Routine*

The extent of any direction or control between the two entities is limited to Barry monitoring Donegal trucks at the Willco Green worksite for the singular purpose of facilitating of WillCo Green. Any limited supervision between managers of Willco Green consisted merely of Willco Green supervisors telling employees of site rules regarding where and when to dump

materials. Donegal is the customer of the landfill, and Barry has to handle operational problems in his "own yard" that could inhibit WillCo's operations with the landfill. (Tr. 1360:16-21.) Donegal, like any other customer of WillCo, must abide by WillCo's rules that are set by Barry. He has the right to correct issues with any customers while they are at the landfill.

Generally, when drivers are offsite, Barry has nothing to do with them, with rare exceptions when drivers have emergencies and Donegal representatives are not available. (Tr. 1356:6-10.) To the extent Barry conducts any limited counseling towards Donegal employees, it is for commonsense functions of operations. (Tr. 1288: 20-22.) Barry's instructions are limited and routine insofar as they consist only of telling Donegal employees where and when to perform the work consistent with *WillCo's* operational needs, while not exercising any authority with respect to the terms under which the work is performed. *See Hy-Brand*, slip op. at 6 "a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work." Simply put, Barry is responsible for Willco Green's normal on-site operations and will have limited interaction with Donegal employees to effectuate those operations. However, Barry does not inform Donegal employees of where or when to perform work – functions that are left to Donegal's dispatchers, Timothy Mix and Bradley. As such, any direction given to Donegal employees by Barry is limited, and does not manifest a joint-employer relationship between the two separate entities.

3. *Regardless of any Joint Employer Argument, the Union Still Violated 8(b)(4)*

Assuming, *arguendo*, that Respondent is able to demonstrate that Donegal, WillCo Green, and/or SJZJ are joint employers, the Union still violated Section 8(b)(4) by bannering and erecting an inflatable rat at the wrong entrance of WillCo Green. A "reserve" gate system was set up at WillCo Green in July or August of 2018. The signage at the "main" gate clearly reads

"This entrance to Wilco Green is reserved for all persons **other than** employees, subcontractors, suppliers, vendors, and delivery persons of Donegal Services, LLC. All employees, subcontractors, suppliers, vendors, and deliver persons of Donegal Services, LLC are prohibited from using this entrance, and must use the entrance to the property which is located directly to the (North, South, East) of this gate which is marked Entrance #2 which is located at 12052 S. Plainfield-Naperville Rd, Plainfield, IL." *Emphasis added.* (CP Ex. 15-17; Tr. 1339:9-10.) Despite the clear signage, the Union set up rats and banners outside the main entrance, which was intended for customers. (CP Ex. 15-1; Tr. 1389: 10-16.) Accordingly, even if there was some type of joint employer relationship between Donegal, WillCo Green, and/or SJZJ, the Union nonetheless violation 8(b)(4) by bannering and placing inflatable rats at the main gate instead of Entrance #2.[28]

V. CREDIBILITY

A. The Union's Position That It Stopped Organizing as of July 10, 2018 Is Not Credible

In a "last ditch" effort to avoid a violation of Section 8(b)(7), the Union, for the first time, attempts to argue at hearing that it had not done any campaigning since June of 2018, and instead had all along been scouting Donegal to identify various health and safety violations. The Union's primary argument is that Donegal directed employees to dump contaminated loads of material at WillCo Green or other sites. As evidence, the Union relies on the testimony of Union salts Mike Munch and Nick Ross, both of which are contracted for services by the Union. Ross claims that he reported to Sundine that he had hauled a contaminated load on November 16, 2018. (Tr. 745:22-24.) Munch testified that he was directed to drop contaminated loads to WillCo Green on multiple occasions, specifically on July 6, 2019. (Tr. 656:17-25; 657:1-2.)

[28] *See Sailors Moon (Moore Dry Dock)*, 92 NLRB 547, 549 (1950).

This testimony is quickly disproven, and draws into doubt the credibility of Ross, Munch, and the integrity of the Union's argument.

1. *The Testimony of Nick Ross*

Ross testified that on November 16, 2018, he had his load "sniffed" for contamination at the WillCo Green site, and that he had been given the "thumbs up" to dump a contaminated load.[29] (Tr. 781:18-25; 782:1-2.) Ross' testimony is readily contradicted by the evidence presented.

Thomas Dieboldt, the operator of the scale house at WillCo Green, testified that he had never "waved in" a load without inspection in his 12 years in the position, and that he has used a "sniffer" machine on every load to check for contamination, as required by law.[30] (Tr. 1436:4-25.) Barry corroborated that every load has to be sniffed by WillCo Green and that he has never witnessed anyone at WillCo Green accept a contaminated load. (Tr. 1400:17-25.) Part-time scale and house attendant Caleb Stell also stated that he has sniffed every load that has ever come in while he has worked at the site. (Tr. 1446:2-7.)

Tellingly, however, Stell testified that Ross had asked Stell not to sniff his load on multiple occasions in December of 2018, around the time the Regional Director filed a petition for preliminary injunction against the Union.[31] (Tr. 1446:8-25; 1447:1-2.) The Union made no attempt to rebut this testimony or to explain why Ross would make those requests. The most plausible inference is that Ross had motive to breach protocol in an attempt to foster the Union's

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[29] The Union failed to present any evidence that Ross' load was actually contaminated other than Ross' uncorroborated statement that "[a]pproximately two to three weeks prior to that, some of the drivers" had loads rejected from the location where he picked up the soil. (745:3-8.)

[30] A "sniffer" is a photoionization detector used to detect volatile chemical compounds at dump sites.

[31] The Regional Director filed a Petition for Preliminary Injunction in the Northern District of Illinois on December 21, 2018.

argument that contaminated dumping was the actual reason for its scouting of Donegal. His motivations are further evidenced by the fact that Ross at no point reported to any management official that he was supposedly dumping contaminated loads and did not provide testimony that he had contacted any government agency.[32]

Further, Ross had a discernible interest in the Union's growth. Ross consistently updated Sundine on organizing activities. In fact, Sundine told Ross that he would give Ross's phone number to other Donegal employees so that Ross could speak for the Union by "saying [things] that the Union" cannot say. (GC 37.) Plainly, Ross' investment in the Union's campaigning activities, as well as his request to circumvent the stiffing process draws his credibility into doubt.

2. *The Testimony of Mike Munch*

Munch, like Ross, had actively discussed the Union with at least one Donegal employee (Tr. 671:15-20; 673:13-24.) Munch updated Sundine on a daily or weekly basis as to his progress in getting a feel for how Donegal employees felt about the Union. (Tr. 683:1-7.) Munch had a visible interest in supporting the Union and its campaigning, and signed an agreement as a salt to assist in organizing Donegal.

Munch testified that he had been directed on several occasions to dump contaminated loads at WillCo Green and other sites. (Tr. 656:17-25; 657:1-2.) Munch specifies that on July 6, 2018, he drove to Elmhurst Chicago Stone to dump clay, received a ticket that the load was rejected, and proceeded to WillCo Green with the load (Tr. 634:6-25; 653:1-25.) Munch further testified that he had received a "preprinted" ticket to enter and dump the load at WillCo Green,

[32] These were by no means the extent of Ross' falsities. For example, Ross testified that he never texted other salts while driving Donegal vehicles. (Tr. 778:16-21.) However, the record shows that he sent text messages to other salts contemporaneous with his travels. *See, e.g.*, CP Ex. 18 (showing Ross send a text message at 3:53 on December 26, 2018, while vehicle manifest records show that he is driving to WillCo Green at that same time).

although WillCo Green's operators are supposed to issue a ticket at the time the trucks arrive. (Tr. 721:14-19.)

The evidence, however, contradicts his testimony. Dieboldt testified that it would be effectively "impossible" to preprint a ticket as suggested by Munch, because a truck has to be parked at a testing station for the scale operator to record the truck's information for the ticket. (Tr. 1437:3-23.) Dieboldt testified that he worked on July 6, 2018, and he would not have preprinted a ticket, especially at that time of day. (Tr. 1443:3-11.) Stell also testified that it was not a practice nor was it possible to preprint a ticket. (Tr. 1448:17-25; 1449:10.) The Union presented no evidence that Dieboldt or Stell would have any reason to fraudulently enter information, to "preprint" a ticket, or to assist Munch with surreptitiously dumping a contaminated load at WillCo Green. In fact, the Union did not articulate any grounds to discredit their testimony.

Further, Munch testified that Donegal maintains a time sheet on which Munch records the time he arrives and leaves worksites. (Tr. 696: 14-19.) On that document, Munch made no indication that he had any form of contaminated load on July 6, 2018. (Tr. 699:8-14.) A ticket Munch states to have received at WillCo Green was issued at 10:03, while the timesheet showed that Munch did not arrive to WillCo Green until 10:15. (Tr: 699:9-12.) Munch never reported on his timesheet or to any Donegal representative that he believed he had a contaminated load, although it was his normal practice to record it. (Tr. 720:1-5.)

Munch also alleges that WillCo Green did not sniff the load he brought on July 6, 2018. (Tr. 636: 4-10.) Like Ross, Munch's testimony is readily disputed by Stell and Dieboldt, who both stated that they would not allow a contaminated load through. Further, Munch, is unable to

recall who dispatched him to WillCo Green and is unable to recall who was operating the sniffer at Willco Green. (Tr. 636:23-25; 637:1.)

Munch's account of events undermines his credibility. Munch's own timesheet contradicts his account of events. Munch never made any effort to record any contaminated load on his timesheet, nor did he make any effort to inform Donegal of a contaminated load. Similarly, Munch made no effort to tell anyone at WillCo Green that his load was contaminated, including the scale house operator. (721: 4-13.) Munch cannot remember who he was reporting to on July 6, 2018, and did not identify any other dates that he purportedly dumped a contaminated load. Like Ross, Munch did not report to his supervisors or to any governing agency that he had been directed to drop off a contaminated load.

3. *The Testimony of Steve O'Gorman*

The testimony of Steve O'Gorman presents similar credibility issues. For example, O'Gorman testified that he did not ask any employee to be a part of the Union after July, 2018. (Tr. 864: 1-2.) However, Mix testified that in August of 2018 O'Gorman had called his cell phone and tried to lure him into signing a card. (Tr. 199:11-25.) O'Gorman even testified that his intention in joining the Union was, at least in part, to organize Donegal. (Tr. 916:3-7.) O'Gorman also conceded that he called employees to talk about "how Donegal was and what their take on it was" after August, 2018. (Tr. 928: 3-25.)

O'Gorman motivation to be untruthful is clear. O'Gorman testified that he wanted to be a member of Local 150 since he was 18 years old. (Tr. 937: 19-25.)[33] O'Gorman filed "multiple applications" with Local 150, but had yet to become a member. (Tr. 938:9-18.) However, "someone" discussed O'Gorman being able to join the Union once the matter with Donegal was

[33] At the time of Hearing, O'Gorman was 29. (Tr. 938:4.)

over. (Tr. 939: 1-7.) O'Gorman further testified that he was "prepared to work" if Local 150 offered him a job. (Tr. 940: 6-12.) O'Gorman's significant investment in the Union, and the implication that he could finally join the Union after matters were resolved, is facial evidence of O'Gorman's motivation to be dishonest and diminishes his credibility.

B. Charging Party's Neutral Witnesses Were Credible

The Company put forward neutral witnesses that testified at hearing with no vested interest in the dispute between Donegal and the Union. Craig Ross and John Boughton, owners of Ross Builders and Boughton Materials, respectively, have no direct stake in the dispute. Nonetheless, Ross and Boughton both testified to how the Union's actions negatively impacted their own businesses.

Similarly, Donegal employees Timothy Mix and William Doherty are credible witnesses. The Union cannot, and has not, demonstrated any reason that Doherty and Mix would have to be untruthful. Rather, both Doherty and Mix were employees that the Union had originally approached to potentially join Local 150. Thomas Dieboldt and Caleb Stell – also not employed by Donegal - have no discernible interest in being dishonest at trial, and have no reason to lie about their job functions at the WillCo Green site. Again, the Union put forward no evidence drawing their honesty into doubt.

Wendell Massengill is no longer an employee of Donegal and testified under subpoena. Massengill did not receive any additional compensation for testifying, and was "shocked" by the subpoena. (Tr. 1424:14-16; 1417:17-18.) Further, Massengill testified that he "grew to have a relationship" with representatives of Local 150 and that they had even promised him jobs (Tr. 1412:6-8; 1416:5-12.) Massengill's testimony should be given full credit.

Similarly, Jose Becerra has no direct interest in the hearing. Regardless, the Union's counsel perplexingly raised Becerra's irrelevant guilty plea to a misdemeanor in February of

2013, more than 5 years ago. (Tr. 1432:17-23.) The Union failed, however, to establish any grounds suggesting that Becerra would give false testimony due to a misdemeanor that is not in any way related to his testimony about the conversations he had with Union representatives.

Why is all of this relevant? Each of the above Union witnesses testified that as of July 10, 2018 they no longer engaged in organizing activities on behalf of the Union. The Company has established ample evidence to refute their testimony. Their overall testimony with regard to other activities they engaged in such as looking for safety violations, DOT violations and OSHA violations is simply not true. With respect to issues dealing with hazardous waste, it is clear that those witnesses are not credible at all and if they cannot be believed with respect to these issues, they certainly should not be found credible with respect to their testimony that they stopped their organizing activity as of July, 2018.

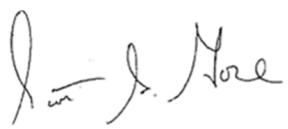
VI. CONCLUSION

The Union violated Section 8(b)(4) of the National Labor Relations Act when it engaged in activities outside the statutory guidelines of the Act through unlawful picketing and unlawful interference of Donegal and Ross Builders through its actions. Further, with respect to Donegal, the Union violated Section 8(b)(7) of the Act by engaging in recognitional picketing for more than 30 days. Therefore, Donegal Services and Ross Builders respectfully request that the Board order the Union to cease its illegal activity, including using inflatable rats and banners at neutral employers, and find in favor of the Company.

Dated: March 22, 2019

DONEGAL SERVICES, LLC and ROSS BUILDERS, INC.

Scott A. Gore
Laner Muchin Ltd.
515 North State Street - Suite 2800
Chicago, Illinois 60654
(312) 467-9800/(312) 467-9479 (fax)

By: 

One of Its Attorneys

CERTIFICATE OF SERVICE
13-CP-227526; 13-CC-227527; 13-CC-231597; 13-CC-233109

The undersigned hereby certifies that true and correct copies of Counsel for the General Counsel's Brief to the Administrative Law Judge have been e-filed with the Division of Judges and served this 22nd day of March, 2019, in the manner indicated, upon the following parties of record.

ELECTRONICALLY

Kimberly Sorg-Graves, Administrative Law Judge
National Labor Relations Board
Division of Judges
121 West 45th Street, 11th Floor
New York, NY 10036-5503

Kevin McCormick, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 S. Dearborn, Room 808
Chicago, IL 60604

Melinda S. Hensel
Dale D. Pierson
Steve Davidson
IUOE, Local 150, AFL-CIO
Legal Department
6140 Joliet Road
Countryside, IL 60525-3956
Mhensel@local150.org
Dpierson@local150.org
Sdavidson@local150.org

Simon Bradley
Donegal Services, LLC.
13011 Grant Road
Lemont, IL 60439-9367
simon@donegalexcavating.com

Craig Ross
Ross Builders, Inc.
23 North Lincoln Street
Hinsdale, IL 60521
craig@rossbuilders.com

Scott A. Gore